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IN THE

Supreme Court of the United States.

No. [redacted] 97

OCTOBER TERM, 1939.

OLGA E. VOELLER, DOROTHY GLOECKNER, NELLIE B. PUGH, BUTLER C. BOND, ANTOINETTE KESSLER AND MAYE B. WILLIAMS,

Petitioners,

vs.

THE NEILSTON WAREHOUSE COMPANY AND THE OHIO NATIONAL BANK OF COLUMBUS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

STATEMENT.

To the Honorable, The Supreme Court of the United States:

Your petitioners, Olga E. Voeller, et al., respectfully pray for a writ of certiorari to be addressed to the Supreme Court of Ohio, the court in which the record herein is now lodged under provisions of Section 237 (b) and 240 (a) of the Judicial Code as amended under the Act of February 13, 1925, and Rules of Practice and Procedure.

This controversy was first filed in the state court January 14, 1937.

It involved the constitutionality of an Ohio statute as measured by the Fourteenth Federal Amendment.

The statute was attacked in the answer in the trial court.

The trial court in its entry declared the statute to be unconstitutional.

The Ohio Court of Appeals in its journal entry reversed the trial court and upheld the statute.

The Supreme Court of Ohio reversed the Court of Appeals and in its opinion declared that the statute is unconstitutional.

The decision of the Ohio Supreme Court was rendered March 27, 1940.

The amount involved is $25,280.00.

This cause originated as an action at law by petition filed January 14, 1937, in the Court of Common Pleas of Franklin county, Ohio, and was heard by the court without the intervention of a jury, the jury being by stipulation waived in that court.

The petitioners, other than Olga E. Voeller, brought similar suits in the Court of Common Pleas of Franklin county, Ohio, upon similar causes of action and by agreement of counsel for all parties and with the consent of the trial court, all of said causes were consolidated with the cause instituted by the petitioner Olga E. Voeller and have since proceeded in the Court of Appeals of Franklin county, Ohio, and in the Supreme Court of Ohio on successive appeals as a consolidated cause.

The petitioner, Olga E. Voeller, sought to recover the sum of $4,000.00 with interest at 6% from June 26, 1936, and the other petitioners sought to recover other amounts, which causes amounted in the aggregate to $25,280.00 with interest from June 26, 1936.

The actions in the trial court arose out of the following circumstances:

On and prior to 1936, the respondent, The Neilston Warehouse Company, was a corporation organized under Ohio laws. In 1936 that corporation was a going concern operating a warehouse at a profit and also paying small dividends and was making monthly payments upon the principal of its mortgage indebtedness at the rate of $500.00 per month.

The directors of that corporation suddenly decided that they wanted to sell the warehouse and in April of 1936 entertained a proposal on behalf of The Creasy Corporation for the purchase of the warehouse and thereupon the directors submitted that proposal to the shareholders and unanimously recommended its acceptance.

This submission was in conformity with the provisions of Section 8623-65 of the General Code of Ohio (112 Ohio Laws, 35, Section 65), a copy of which statute is as follows:

> "A corporation may, by action taken at any meeting of its board of directors, sell, lease, exchange or otherwise dispose of all or substantially all of its property and assets, including its good will, upon such terms and conditions and for such considerations, which may be money, shares, bonds, or other instruments for the payment of money or other property or considerations, and, if desired, may divide or distribute such considerations among its shareholders on such terms and basis and in such manner as its board of directors deems expedient, when and as authorized by the vote of holders of shares entitling them to exercise at least two-thirds of the voting power on such proposal, or the vote of such other proportion, not less than a majority, or vote by classes, as the articles may require, at a shareholders' meeting called for that purpose. Notice of such meeting shall be given to all of the shareholders of record of the corporation whether or not they shall be entitled to vote thereat.
>
> "Nothing in this section is intended to restrict the power of any corporation, without the authorization

thereof by the shareholders, to sell, lease, exchange, or otherwise dispose of, any of its property if thereby the corporate business be not substantially limited, or if the proceeds of such property be appropriated to the conduct or development of its remaining business.

"Dissenting shareholders, whether or not entitled to vote, shall be entitled to relief in the manner and under the conditions hereinafter provided." (Boldface ours.)

That statute which is similar to the statutes of many of the states of the Union governing the sale of all or substantially all of the assets of a corporation, provides that such a sale can be made "when and as authorized by the vote of holders of shares entitling them to exercise at least two-thirds of the voting power on such proposal * * * at a shareholders' meeting called for that purpose."

The proposal was to sell real estate, which was carried on the books of the company at a valuation of $353,499.74 (Transcript, page 102), for the sum of $171,560.00 (Transcript, page 74).

At the meeting of the shareholders the proposal failed to receive a favorable vote of two-thirds of the shares; thereupon in the following month another proposal to purchase the real estate was received from the same prospective purchaser, The Creasey Corporation of Louisville, Kentucky, offering $196,950.00 (Transcript, page 49). The directors again recommended this proposal and called another meeting of stockholders. There were 5,078 shares of stock issued and outstanding and 4,783 were represented at the meeting; 3,591 shares voted for the proposal and 1,125 voted contra. The directors therefore had the authority to make the sale. Section 8623-65 contained the following final paragraph:

"Dissenting shareholders whether or not entitled to vote, shall be entitled to relief in the manner and under the conditions hereinafter provided."

By that final paragraph, Section 8623-72 was made a part of subsection 65. Section 8623-72 (114 Ohio Laws, 66) in its pertinent provisions, is as follows:

"Unless the articles otherwise provide, any dissenting shareholder, who shall not have voted in favor of the proposals herein mentioned and by the provision of any section of this act, is entitled to relief when the articles of the corporation have been amended, or when all or substantially all of the property and assets of the corporation have been authorized to be sold, leased, exchanged, or otherwise disposed of, or when a consolidation or reorganization of the corporation has been authorized, shall be paid the fair cash value of his shares as of the day before the vote was taken authorizing any such action, excluding from such fair cash value any appreciation or depreciation in consequence of the consolidation or other matter which entitled him to such relief, if such shareholder within twenty days after the day on which the vote was taken, shall object in writing to the action so taken and shall demand in writing the payment of such fair cash value of his shares. Such payment shall be made within thirty days after such fair cash value is agreed upon or determined. If a person is the holder of more than one class of shares he shall be entitled to relief only in respect of the class of shares in respect of which relief is provided by this act.

"Any such objection and demand for the payment of fair cash value of shares shall state the number and kind of shares held by the dissenting shareholder making the demand, and the amount which such shareholder claims is such fair cash value.

"The right of a dissenting shareholder to be paid the fair cash value of his shares shall cease if and when the corporation for any reason shall abandon its purpose or the shareholders shall revoke the authority to sell, lease, exchange, or otherwise dispose of its assets, consolidate, reorganize or amend its articles.

"No demand for payment of such fair cash value may be withdrawn by the shareholder making the same unless the corporation, by its board of directors, shall consent to such withdrawal (or unless the right of such

dissenting shareholder to be paid the fair cash value of his shares has ceased.

"Within ten days after the receipt of such demand the corporation shall inform such shareholder in writing whether it will pay the demanded amount, and, if it refuses to pay such amount, it shall offer in writing to pay an amount as and for such fair cash value.

"If the corporation shall not agree to pay the amount demanded, or the dissenting shareholders shall not agree to accept the amount offered by the corporation, the corporation or the dissenting shareholder, if he has complied with all the conditions of this section, may, within six months thereafter, petition the Court of Common Pleas of the county in which such corporation or the consolidated corporation has its principal office to determine the fair cash value of the shares mentioned in such demand as of the day before the vote was taken to which objection was made as aforesaid.

"If such petition is not filed within such period, the fair cash value of the shares shall conclusively be deemed to be equal to the amount offered to the dissenting shareholder by the corporation if any such offer shall have been made by it as above provided, or in the absence thereof, then an amount equal to that demanded by the dissenting shareholder as above provided." (Boldface ours.)

* * * * * * * * * *

"A shareholder who so objects in writing and demands in writing payment of the fair cash value of any shares shall not be entitled to vote such shares or to exercise any rights respecting such shares or to receive any dividends or distributions thereon, unless and until the sale, lease, exchange, other disposition, consolidation, reorganization or amendment shall, for any reason, be abandoned, or, with the consent of the corporation, the objection and demand shall be withdrawn; provided that if, prior to such abandonment, withdrawal or the consummation of such corporate transaction, dividends shall be paid in money to shareholders of the same class as those dissenting and who are of record on or after the day on which the vote was taken authorizing such corporate transaction, then and at such times an amount of money equal to the dividends

otherwise payable upon such dissenting shares shall be paid to the holders of record thereof who would, except for such dissent, be entitled to receive such dividends, and each such payment shall be a credit upon the total amount to be paid for such shares by or on behalf of the corporation. If the corporation shall, prior to such abandonment, withdrawal or the consummation of such corporate transaction, make distribution of anything other than money on a class of shares as to any of which such a dissent has been made, such distribution shall be computed as though such dissenting shares were included in the total outstanding shares of such class entitled to participate therein. All the holders of such dissenting shares of record at the time of any such abandonment, and any holder of record so withdrawing said objection and demand, shall thereupon be restored to the status of a shareholder; and any of such payment theretofore made on such shares shall be deemed to have been dividends thereon. If, prior to any such abandonment or withdrawal, distributions other than of money have been made upon such class of shares then, in the event of abandonment, all of the then holders of record of dissenting shares, and, in the event of any such withdrawal, the then holder of record of such dissenting shares so withdrawing such objection and demand, shall receive such distributions as though the rights of such dissenting shares had not been suspended.

"Any shareholder who does not object and demand in writing the payment of the fair cash value of his shares, in the manner and at the time hereinbefore provided, shall be concluded by the vote of assenting shareholders.

"A corporation may rescind any vote authorizing the sale, lease, exchange or other disposition of its assets, consolidation, reorganization or amendment, abandon its purpose, and revoke authority conferred by any vote at any time before the action so authorized has been completed, by the same vote as was required to authorize such action."

Subsection 72 provides in substance that any dissenting shareholders "shall be paid the fair cash value of his shares as of the day before the vote was taken authorizing any such action, excluding from such fair cash value any appreciation or depreciation in consequence of the consolidation or other matter which entitled to him such relief, if such shareholder within twenty days after the day the vote was taken, shall object in writing to the action so taken and shall demand in writing the payment of such fair cash value of his shares."

Thereupon, and within twenty days, these petitioners as dissenting shareholders, owning in the aggregate 288 shares, filed written objections and demands. These objections and demands were made to the corporation itself.

At this point another provision of subsection 72 became applicable:

> "Within ten days after the receipt of any such demand, the corporation shall inform such shareholder in writing whether it will pay the demanded amount, and, if it refuses to pay such amount, **it shall offer in writing to pay an amount as and for such fair cash value.**" (Boldface ours.)

Acting within that ten-day period the corporation directed a letter to each of the demanding stockholders under date of June 26, 1936, as follows:

> "Your demand for payment is refused. The purpose for which The Neilston Warehouse Company was incorporated has been abandoned.
>
> "The Neilston Warehouse Company,
> "By G. W. Bobb, President."

(Transcript, page 85.)

It will thus be seen that the corporation did not see fit to make a counter offer.

This brings us to the sixth paragraph of Section 72, which provides:

> "If the corporation shall not agree to pay the amount demanded, or the dissenting shareholders shall not agree to accept the amount offered by the corporation, the corporation or the dissenting shareholder, if he has complied with all the conditions of this section, may, within six months after the date on which the vote was taken but not thereafter, petition the Court of Common Pleas of the county in which such corporation or the consolidated corporation has its principle office to determine the fair cash value of the shares mentioned in such demand as of the day before the vote was taken to which objection was made as aforesaid."

It will thus be seen that either the corporation or the dissenting shareholder might have brought an action within the six months period to determine the fair cash value, but the fact is that neither the corporation nor the dissenting shareholder brought such an action within that period.

Thereupon, another provision of Section 72 became applicable, which will be hereinafter referred to as the seventh unnumbered paragraph of the section and which paragraph becomes the crux of this controversy. That paragraph reads as follows:

> "If such petition is not filed within such period, the fair cash value of the shares shall conclusively be deemed to be equal to the amount offered to the dissenter by the corporation if any such offer shall have been made by it as above provided, or in the absence thereof, then an amount equal to that demanded by the dissenting shareholder as above provided."

There has never been in any of the courts through which this litigation has proceeded any question or doubt as to the meaning of that paragraph, and it has never been doubted that if that paragraph is a constitutional provi-

sion that these petitioners had a right to recover the respective amounts for which they sued. That is to say, the petitioners herein as dissenting shareholders having made their demands of definite sums of money as the fair cash value of their stock, and those demands having been refused by the corporation without at the same time offering "in writing to pay an amount as and for such fair cash value," the result of the failure of the corporation to offer "an amount" or to bring an action within six months was to make it obligatory upon the corporation to pay the full amounts demanded by the dissenting shareholders who brought suits therefor.

The petitions filed by the plaintiffs in the Common Pleas Court and who are now the petitioners in this proceeding alleged in their petitions the operative facts as hereinbefore stated. (Transcript, page 1.)

The amended answer filed by the corporation did not traverse any of those operative facts. **The fifth defense of that answer pleaded the constitutionality of the statute as being violative of the due process clause, to wit, Section 1 of the Fourteenth Amendment.** (Transcript, page 6.)

Replies were filed by these petitioners, but those replies only completed the legal issue of constitutionality or unconstitutionality of the seventh unnumbered paragraph and raised the further issue of estoppel. (Transcript, page 11.)

THE CONSTITUTIONAL QUESTION INVOLVED.

The sole question decided by each of the courts of the state of Ohio and the sole question which will be presented to the Supreme Court of the United States relates to the constitutionality of that seventh unnumbered paragraph, and whether by the provisions of that paragraph the majority stockholders had a fair opportunity to controvert the demands of the dissenters in the amounts demanded by them.

In the trial of this cause in the Common Pleas Court and inferentially in the Supreme Court it was decided that the corporation itself had not been denied due process, but it was further decided that the majority stockholders by reason of not having been named in the statute and by reason of not having been expressly given certain undefined powers as stockholders that the seventh paragraph was unconstitutional as to them, on the ground that the majority stockholders as such were being denied due process.

The issue of the separate individual rights of the majority shareholders as such was first clearly drawn by an intervening petition filed by one of the majority shareholders on her own behalf and also on behalf of all other shareholders similarly situated which was filed on April 10, 1937, sometime after the filing of the original answer by the corporation, which answer was filed on the twentieth day of March, 1937. This intervening petition will be found in the transcript filed herewith. (Transcript, page 93.)

The intervening petition was filed by the same counsel who have represented the corporation throughout these proceedings. It raised the same constitutional defenses as were contained in the amended answer filed by the corporation. The prayer of the intervening petitioner was that "her rights and the rights of all other shareholders in The Neilston Warehouse Company, similarly situated, be protected."

To this intervening petition a motion was filed by counsel for Mrs. Voeller, on the ground "that said intervening petition sets up no defense not available to the defendant, The Neilston Warehouse Company."

This motion was sustained and thereupon an application for rehearing was filed and Judge Dana Reynolds upon

the application for rehearing rendered the following opinion (Transcript, page 100):

"On rehearing the motion of plaintiff to strike from the files the intervening petition of Bertha K. Krause is sustained.

"Leave to file the intervening petition was granted in an ex parte hearing without notice to plaintiff, and unless relevant, and material to the issues in the case, it has no place in the case.

"The action here is between the plaintiff, a stockholder in defendant company, and that company, to recover the claimed value of her stock after sale of the company's entire assets.

"The statute gives specific directions as to procedure both by the stockholders and by the directors of the company, if the latter considered the valuation placed by the stockholder on her stock to be in excess of its real value.

"Their failure to comply with the statute resulted in certain consequence as fixed by the statute.

"It is not unconstitutional as suggested by counsel, as the opportunity for the company to protect itself is amply provided for." (Boldface ours.)

"The failure to take advantage of the statutory provision may result unfortunately for other stockholders, but their remedy would be against those directors who were derelict in their duty.

"The issues raised by the plaintiff is whether or not plaintiff has complied with the provisions of the statute.

"On this issue the intervening petition is irrelevant.

"Reynolds, J.

"Dated September 30, 1937."

Following that opinion, entry was placed upon the journal of the court as follows (Transcript, page 101):

"Entry.

(Filed February 17, 1938.)

"This day this cause came on to be heard upon the motion of the plaintiff to strike the intervening peti-

tion of Bertha K. Krauss from the files and to dismiss her as a party herein, and the court being fully advised in the premises finds that said motion is well taken and should be sustained. The court also finds that the motion for rehearing filed on behalf of said intervenor is not well taken and should be overruled.

"It is accordingly ordered, adjudged and decreed that said motion of the plaintiff be sustained and that said motion for rehearing of the intervenor should be overruled, and the intervening petition of the said Bertha K. Krauss is ordered stricken from the files and she is dismissed as a party herein, to which finding and order of the court said intervenor excepts."

We call special attention to the opinion of Judge Reynolds wherein as early as September 30, 1937, he declared that the statute was constitutional and that the company had ample opportunity to protect itself and that the remedy of the majority stockholders, if any, was "against those directors who were derelict in their duty."

The intervening petition of the majority stockholders was therefore dismissed, which was a final order as to them and they did not appeal from that final order.

We fully appreciate the rules and precedents which only permit us to argue the constitutional question in this court and yet we think the intervention of the majority stockholders in the original action, their dismissal and their failure to appeal becomes a significant element in the case. It is further an indication that opposing counsel then believed, as they should still believe, that the majority stockholders could have intervened before the expiration of the six months period and that they had a **fair opportunity** to protect whatever rights they desired to assert during that six months' period by compelling the directors and officers of the corporation to make a counter offer within ten days or to bring an action to determine

the value which would in turn have repelled any presumption as to the fair value of the stock under the provisions of said seventh unnumbered paragraph.

Notwithstanding this decisive action on the part of Judge Reynolds in disposing of the intervening petitioners, when the case came on for trial on its merits before Judge Charles Leach, he disregarded the former action of Judge Reynolds and made a contrary ruling on behalf of the majority stockholders and entered judgment against the dissenting stockholders. In so doing he declared that the statute was constitutional as to the corporation itself, and that while the statute was not objectionable on its face, it was unconstitutional because of its effect in operation, further declaring that the "stockholders **as such** have not had such fair opportunity."

On appeal to the Court of Appeals, the court on May 9, 1939, by a divided court reversed the Court of Common Pleas, holding that the "Common Pleas Court erred in finding that General Code Section 8623-72 as to the seventh unnumbered paragraph thereof, was unconstitutional as being in violation of the due process clause of the Constitution of the United States."

We quote the concluding paragraph of Judge Geiger who wrote the majority opinion in the Court of Appeals, as follows:

> "We arrive at the conclusion that the consenting stockholders had a right to intervene to have their interests determined and that therefore a holding as to 'the fair cash value' of the stock owned by the dissenting stockholders **was not an appropriation of the property of the consenting stockholders without due process of law.** The contrary view being the basis upon which the court below entered his judgment it follows the judgment below should be reversed and cause remanded. (Boldface ours.)
>
> Hornbeck, P. J., concurs.
>
> Barnes, J., dissents."

On May 19, 1939, an application for rehearing was filed by the corporation. In its decision rendered June 2, 1939, denying such application the Court of Appeals, by the concurrence of all judges thereof, said:

> "Counsel for defendants-appellees have leveled some criticism at the opinion for the reason that the opinion has used the words **'intervene'** and **'procedure'** as though they were necessarily used as applicable to a party intervening in a pending court action. To intervene in one's own behalf has a broader meaning than that and all that was attempted to be said was that the assenting stockholders had a right to protect their own interests in the distribution of the assets of the corporation under the statutes involved. Whether or not such action of the corporation was a 'procedure' or 'proceeding' is of little consequence. It was the method prescribed by the statute by which the interests of the various stockholders could be determined and a stockholder, whether assenting or dissenting, had an interest in the matter and had a right to protect that interest which no court would deny if proper application were made. We do not agree that the assenting stockholders were required to wait six months before presenting whatever complaint they may have had, to the court under the statute, or to properly protect their interests."

The journal entry of the Court of Appeals will be found in the transcript filed herein. (Transcript, page 90.)

On appeal to the Supreme Court of Ohio, that court by its decision rendered on the twenty-seventh day of March, 1940, agreed with Judge Leach who heard the case on its merits in the Common Pleas Court and disagreed with Judge Reynolds, who had declared the law to be constitutional; it likewise disagreed with the majority of the Court of Appeals and rendered the following judgment as declared in the syllabus:

> (1) "The constitutionality of a law may be determined by its operative effect."

(2) "A statute, the operative effect of which is to deprive a person of his property without notice and without opportunity to be heard before a competent tribunal, is violative of Section 1 of the Fourteenth Amendment of the Federal Constitution."

(3) "That part of Section 8623-72, General Code, creating a conclusive presumption in favor of minority stockholders of a corporation who have demanded the fair cash value of their shares constitutes a denial of due process of the majority in failing to afford them an opportunity to repel it, and has an unconstitutional operation." (Transcript, page 103.)

We do not take issue with the first and second paragraphs of the syllabus, but merely call attention to that phrase of the second paragraph "without notice and without opportunity to be heard." It is of course our contention that the seventh unnumbered paragraph of Section 8623-72 was reciprocal in its operation and that by reason of its provisions the dissenting stockholders would have been bound by any offer made by the corporation, if the dissenting stockholders had failed to bring an action within six months. Inasmuch as the corporation failed to make any offer within the ten-day period, the corporation became bound to pay the demands of the dissenting stockholders by reason of not having brought a similar action within six months.

The constitutional question was determined twice in the Common Pleas Court and twice in the Court of Appeals, once on a judgment of reversal and later on a rehearing, and the constitutional question was again decided in the Supreme Court. In each of these instances, the constitutional determination appears not only in the issues but in the judgment as well.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(1) The Supreme Court of Ohio has erred where a federal constitutional question is involved, and where the United States Supreme Court has not heretofore determined the question, and has declared principles not in accord with applicable federal decisions.

Leavenworth Co. v. Chicago, R. I. & P. Ry. Co., 18 Fed., 209;
Beechwood Securities Corporation, Inc., v. Associated Oil Co. et al., 104 Fed. (2d), 537.

These cases are commented upon at pages 35 and 36 of the appended brief.

(2) It is the judgment of the Ohio Supreme Court that the statute is unconstitutional because it does not expressly provide for notice to the majority shareholders and expressly give the majority shareholders certain undefined powers in relation to such a transaction. The necessary effect of the decision is:

(a) That redress to dissenting shareholders can only be obtained by the dissenting shareholders notifying the majority shareholders of their demands.

(b) Even though the answer of the corporation and the intervening pleading of the majority stockholders make no allegation concerning lack of notice or knowledge and even though the dissenting shareholders recorded their vote in the open meeting in the presence of the majority shareholders, it leaves the dissenting shareholders without redress and the majority shareholders are not even put upon inquiry.

(c) That when the vote is taken in the open meeting the proceeding is entirely ended so far as the majority shareholders are concerned—any action taken or to be taken thereafter by the dissenting shareholders is the beginning of a new proceeding so far removed from the former proceeding that notice and knowledge must be served by the dissenting shareholders upon the majority shareholders.

(d) The necessity of notice to and knowledge of the majority shareholders is so imperative and the rights of the majority shareholders are so paramount that the dissenting shareholders are without remedy, unless it is alleged and proven that the dissenting shareholders gave notice of their demands to each majority shareholder. This burden rests upon the hapless dissenter, as a condition precedent to their obtaining redress.

(e) Inasmuch as the directors must necessarily be owners of stock, and in this present case it so happens that they were the owners of approximately one-third of all the stock, the directors are as majority shareholders in the full benefit of the lack of knowledge on the part of certain majority shareholders.

(3) It was the opinion of the Ohio Supreme Court that Section 8623-72 providing relief for dissenting shareholders is separate and distinct and covers a different subject from Section 8623-65. This view is obviously unsound. Section 8623-65 would obviously be unconstitutional except for the relief provided in Section 8623-72. The latter is an essential supplement of the former.

This feature of the case must be considered in connection with the further erroneous view that the majority shareholders are denied due process. Furthermore, we must keep in mind that after the majority have imposed

their will upon the minority by authorizing the sale, it properly becomes a matter of negotiation to determine the rights of dissenting shareholders and the amount to be paid to them for their stock.

To illustrate the difficulties created by the Ohio decision, it is only necessary to refer to such large corporations as The A. T. & T. Company, the U. S. Steel Company, General Motors Corporation, and Proctor and Gamble Company. In more than one of these corporations, the number of stockholders runs into the tens of thousands. If any one of those corporations would want to amend its articles or to effect a merger with another corporation and a two-thirds majority should decide to amend or merge, under the Ohio decision the dissenting shareholders would be without remedy unless all the majority shareholders should be individually notified of the demands of the dissenters. In such event, it may be wondered, under the principles declared by the Ohio Supreme Court, whether the majority shareholders would be compelled to act as a body or with unanimity or by majority of the majority, or what percentage of the entire number should act in order to make the statute valid.

Referring to the matter of negotiation with dissenting shareholders in an effort to reach an agreement as to the fair cash value, if the corporation may not act for the majority what proportion of either the dissenters or the majority shareholders would be required to concur in order to render this statute constitutional. Surely, the impracticability of such a situation conclusively shows that no such provision could be made or if it were made that it would be practical in operation.

(4) Other states of the Union have provisions in their statutes relative to the sale of entire assets of a corporation

similar to the seventh unnumbered paragraph of Section 8623-72, and if this decision of the Ohio Supreme Court is permitted to stand unchallenged and unreversed, that decision will be cited in the courts of those states where similar controversies occur. If the decision of the Ohio Supreme Court is sound, it should be so declared by the Supreme Court of the United States, and thereby become a precedent to be followed by the courts of other states. In that event, the Legislature of those states and the Legislature of the state of Ohio may make proper amendments to their statutes and render them constitutional. If the decision is unsound, the Supreme Court of the United States as the final arbiter of questions of violation of the federal Constitution should so declare, to the end that the legislation in Ohio and other states may remain unimpaired.

(5) The denial of this petition for certiorari would give added force to the decision of the Ohio Supreme Court, assuming its unsoundness, because the fact of the denial of certiorari would be referred to in any future controversies in the state of Ohio or in other states having similar statutes, and this fact makes it important that there be a final determination of the principles involved in this controversy by the United States Supreme Court.

(6) We call attention to certain declarations of principles found in the majority opinion of the Ohio Supreme Court, which we think are erroneous general statements of law and are particularly erroneous as declared in controversies between corporations and dissenting stockholders in proceedings for a sale of entire assets. We quote the following examples (see Transcript, page 103):

> (a) "The pecuniary and personal interest of two opposing groups of stockholders are primarily involved in a situation like the present one—the majority who

vote for the sale of the corporate property and the minority who did not so vote."

(b) "Majority stockholders are left entirely out of the equation."

(c) "Directors are in no sense personal representatives of the stockholders by whose sufferance they hold office."

(d) "A stockholder and the corporation of which he is a member are separate and distinct persons in law and their interests are always distinct and some times adverse."

(e) "A stockholder of a corporation is not chargeable with actual knowledge of its business affairs or of notices imparted to it."

(f) "The voting and later conduct of the minority were separate and distinct matters."

(7) The Ohio Supreme Court decision violates the well-settled principle of the common law of Ohio and we think of every state in the Union that where directors are unfaithful to their trust or exceed their corporate powers or are negligent in the discharge of their duties, any stockholder who conceives himself to be aggrieved, may bring an action in the name of the corporation to protect corporate rights and incidentally, stockholders' rights. This will be amplified in our supporting brief.

(8) By the simple expedient of making a counter offer within ten days after the dissenting stockholders have made their demands, the situation would have been completely reversed in such event, if the dissenting shareholders had failed to bring an action within six months, they would have been compelled to accept any offer so made.

(9) It will be conceded that any statute which in terms creates a conclusive presumption where there is no fair opportunity to avoid or repel the presumption would be unconstitutional, and this principle has been so declared

in more than one decision of the United States Supreme Court, as will be hereinafter discussed in our supporting brief.

On the other hand the United States Supreme Court decisions are quite consistent in construing statutes to be constitutional which in terms create a conclusive presumption, but which in fact afford a fair opportunity to avoid or repel the presumption.

(10) This statute is in the nature of a statute of limitations, or more accurately stated, it is a jurisdictional limitation upon the right to bring an action to question the amount demanded as fair cash value after expiration of the six months' period.

(11) We are, of course, not asking this court to consider and decide any question other than a federal question, nevertheless, we point out that as a precedent to be decided in future litigation in Ohio and in litigation in other states, the Ohio opinion should not stand unchallenged because of its erroneous conclusions in several particulars involving matters of local law.

(a) The majority stockholders filed an intervening petition in the Common Pleas Court and upon motion being filed to dismiss the intervening petitioners. The motion was sustained and they were dismissed from the case. This was a final order and an adjudication that they had no rights which were separate and distinct from the rights of the corporation itself, and the dissenting stockholders did not appeal from that final order. The Ohio Supreme Court held that by such determination, res judicata did not apply to the majority stockholders. (See opinion, page 112 of the Transcript.) We think this was an erroneous decision upon the question of res judicata. A reversal of the Supreme Court of Ohio would avoid this feature of the case as a precedent.

(b) It was argued by these petitioners in the Supreme Court of Ohio and the argument was sustained in the dissenting opinion of Judge Hart:

> "That the defendants, having invoked the powers created by Section 8623-65, General Code, to bring about a sale of the corporate property, are, under authority of New York Central Rd. Co. v. City of Bucyrus, 126 Ohio St., 558, 186 N. E., 450, now estopped to question the constitutionality of that part of Section 8623-72, General Code, which creates a conclusive presumption in favor of minority shareholders." (See dissenting opinion, Transcript, page 113.)

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Ohio, commanding that court to certify, and to send to this court for review and determination, on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 27724, Olga E. Voeller, Dorothy Gloeckner, Nellie B. Pugh, Butler C. Bond, Antoinette Kessler and Maye B. Williams, plaintiffs-appellees, v. The Neilston Warehouse Company and The Ohio National Bank of Columbus, defendants-appellants; and that said judgment of the said Supreme Court of Ohio may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Olga E. Voeller, Dorothy Glocker, Nellie B. Pugh, Butler C. Bond, Antoinette Kessler, and Maye B. Williams,

By CARRINGTON T. MARSHALL,

ORLAND R. CRAWFIS,

Attorneys for Petitioners.

BRIEF.

CONSTITUTIONAL QUESTION INVOLVED.

We will again state the issue involved in the state courts and which therefore becomes the issue in this review. That there may be no mistake about this, we quote from the opening statement of the brief of opposing counsel in the Ohio Supreme Court:

> "Only the **individual rights** of shareholders are involved. The sole question is as to the constitutionality of the seventh (unnumbered) paragraph of Section 8623-72, General Code. More precisely stated, it is whether or not the **conclusive presumption** provided in the statute violates the **due process** clause of the Fourteenth Amendment of the Constitution of the United States."

Section 8623-72 is supplementary to Section 8623-65 and both sections are set forth at pages 3 to 5 of this petition.

Section 8623-65 is a restraint upon an Ohio corporation and the officers and directors to prevent them from making a sale of all or substantially all assets, but nevertheless permits such sale to be made if a two-thirds majority of all shareholders entitled to vote approve the sale. Section 8623-65 is for the sole benefit of the majority and permits the majority to make such sale however disastrous the sale may be to the interest of the corporation and more particularly to the dissenting minority. How arbitrary and dictatorial the majority may be is well illustrated in the instant case. A corporation paying regular dividends and making substantial payments each month upon the principal of mortgage indebtedness, engaged in the warehousing business, ordered the warehouse sold to gratify the selfish purposes of the majority at a price which was only

fifty-five percent of its book value and less than fifty percent of its real value.

Granting such authority to the majority shareholders would have been a denial of due process in the absence of some provision for the protection of the dissenting shareholders. Instead of making provision for the protection of the dissenting shareholder in the body of Section 8623-65, the last paragraph of that section contained the following:

> "Dissenting shareholders, whether or not entitled to vote, shall be entitled to relief in the manner and under the conditions hereinafter provided."

The further provision referred to is Section 8623-72. The constitutionality of both sections, when taken together, has never been doubted either as to the corporation or as to the majority or the dissenting shareholders. If the provisions of Section 8623-72 had been followed by The Neilston Warehouse Company, this controversy would never have arisen.

The first step required to be taken by a dissenting shareholder is that provided in the first unnumbered paragraph of Section 72 requiring him within twenty days to object in writing to the action of the majority and to demand in writing the payment of the fair cash value of his shares. The second unnumbered paragraph requires that such demand shall state the amount demanded. The third unnumbered paragraph permits either the corporation or the majority shareholders upon receipt of such demand to abandon the purpose to sell.

If there is no abandonment, then the fifth unnumbered paragraph requires the corporation within ten days after receipt of the demand to inform the shareholders, in writing, whether it will pay the demanded amount and, in the

event of refusal, to make a counter offer in writing "of an amount as and for such fair cash value."

If the corporation fails to comply with the fifth paragraph, they still have ample opportunity to protect majority shareholders because it is provided in the sixth paragraph that the corporation may begin an action within six months in the Court of Common Pleas of the county to determine the fair cash value. It will thus be seen that the corporation had three separate and distinct opportunities to avoid the payment of an unfair demand:

(1) To abandon the purpose to sell, and the majority shareholders were expressly given the right to revoke the authority to sell.

(2) To make a counter offer within ten days.

(3) To bring an action within six months.

This brings us to the seventh unnumbered paragraph which becomes the crux of the controversy. Neither the corporation nor the majority shareholders nor the dissenting shareholders having brought an action within six months, the situation was controlled by the seventh paragraph which has been quoted in boldface at page 6 of this petition.

The dissenting shareholders having faithfully complied with the statute in all its particulars and the corporation and the majority shareholders having failed to abandon the purpose to sell and the corporation having failed to make a counter offer and the corporation having failed to bring a suit and the majority shareholders having failed to bring an action in the name of the corporation within six months to determine the fair cash value, the statute permits the dissenting shareholders to recover the amounts demanded by them.

This controversy involves no element of interpretation. It has never been questioned by any of the courts of Ohio or by any judge thereof in this controversy that the seventh paragraph is constitutional in so far as it applies to the corporation itself. The only question is as to whether the majority shareholders have individual rights **as such** which are not protected.

OHIO COURTS HAVE HELD SECTION 8623-72 TO BE CONSTITUTIONAL.

The seventh paragraph of that section has not been in effect many years and no court has heretofore been called upon to pass upon the validity of that segregated paragraph. In fact it is difficult to imagine that any other case would ever arise where the corporation or the majority stockholders would defiantly refuse to comply with the provisions for making an offer of a definite amount or to bring an action within six months to determine fair cash value and then expect the courts to relieve from such defiant and flagrant omission. Apparently, the instant case is the first example of any such omission and it will probably be the last.

While no court has passed upon that particular paragraph, two courts in Ohio have made general declarations of the constitutional validity of Section 8623-72. One of these cases is **Williams v. National Pump Corp.**, 46 Ohio Appeals, 427, 188 N. E., 756. In that case, it was the dissenting stockholder who was claiming unconstitutionality but, of course, if it is constitutional as to the dissenting stockholders, it must be constitutional as to the majority stockholders and to the corporation itself.

Another unreported case is **Miller v. Canton Motor Coach**, decided by the Court of Appeals of the Fifth District, December 30, 1937. Again the issue was raised by the dissenting stockholder. We quote from that opinion as follows:

> "The appellant contends, first, that Section 8623-72, General Code, was not a valid enactment by the Legislature, and, in any event, is unconstitutional. Its counsel suggests that the trial court disposed of these contentions with a wave of the hand. Frankly, we are disposed to do much the same thing. **We see nothing at all in the contention that this section, as enacted and in the form in which it was printed, is invalid, or is anything other than a properly enacted statute of the General Assembly of Ohio.**
>
> "We note, incidentally, that the constitutionality of this section, as well as Sections 8623-14 and 8623-15, was upheld by the Court of Appeals of the Second District in the case of Williams v. The National Pump Corporation, 46 Ohio Appeals, 427, on pages 432 and 433. In his opinion that court says:
>
> " 'These sections should be read into the certificates and form a part thereof.' "

Motion to certify denied. No debatable constitutional question. 133 O. S., 384.

STATUTE SHOULD BE LIBERALLY CONSTRUED IN FAVOR OF MINORITY SHAREHOLDERS.

In 87 A. L. R., 598, under annotations with reference to "Construction and effect of provisions for payment of dissenting stockholders in statutes relating to merger," etc., and under the sub-heading "Strict or Liberal Construction" it is stated:

> "The courts have taken the view that statutes of the kind under consideration, providing for the appraisement and payment of the value of the stock of

dissenting stockholders upon the consolidation with another company, should be liberally construed in favor of such stockholder."

The same authority, at page 603, in a further discussion of the principle of liberality in construction **in favor of the minority or dissenting shareholders** and in commenting on Manning v. Brandon Corp (1931), 163 S. C., 178, 161 S. E., 405, states:

"It was said that the statute, which gave the consolidating corporation one of the highest rights known to the law, viz., that of taking the property of the stockholder over his objections, did not intend that the consolidation should take place without the payment to the stockholder of the value of his stock and all costs and attorney fees which he had incurred in the proceeding; and that the statute should be construed liberally in favor of the stockholder, so as to carry out the manifest theory of the act ,and to save harmless the stockholder from all costs and expenses."

As said in New Jersey & H. R. R. Co. v. American Electrical Works (1911), N. J. L., 391, 81 Atl., 989:

"The scheme of the act is to provide a simple and prompt remedy for what otherwise might be a serious injustice to the minority stockholders. The majority in interest in availing themselves of the privilege conferred by the act to make a consolidation of the companies, agree in advance to make compensation to the dissenters."

And on the matter of liberal construction in favor of the minority stockholders we are not without precedent in Ohio, because in **Miller v. Canton Motor Coach**, supra, the Court of Appeals, Fifth District, in approving Manning v. Brandon Corp., supra, quoted the following:

" 'This statute should be construed liberally in favor of the stockholders, so as to carry out the manifest theory of the act.' "

This judgment was appealed to the Ohio Supreme Court on motion to certify and the motion was at first sustained but later the motion to certify and a petition in error was dismissed upon the ground that no debatable constitutional question is involved. 133 O. S., 284; 14 N E. (2d), 15.

THE MAJORITY SHAREHOLDERS OR ANY ONE OF THEM COULD HAVE ACTED IN THE NAME OF THE CORPORATION.

Referring to the trial court's opinion, we find the following language:

> "Reference to the section involved, as above stated, shows that the plaintiffs might have petitioned the court to have had determined a fair cash value of their shares; **the corporation could have done likewise.** (Boldface ours.) But (and this, as the court views the situation is the crux of the matter) could the other stockholders so have petitioned the court, or taken any other action to safeguard their present interests in this regard."

The trial court then, in disposing of the case in favor of the defendant, proceeded to answer its own question in the negative and thus ignored the Hornbook Law which clearly and unequivocally gives the majority shareholders, or any one of them, the right to act for the corporation and to thus safeguard their own and the corporation's rights.

In meeting that issue, the Supreme Court of Ohio in its opinion takes the utterly indefensible position that the majority shareholders, outside of the directors, were not shown to have had knowledge of the demands of the dissenting shareholders or that those demands had been refused without a counter offer having been made. It must be said in passing that there was no issue of lack of knowledge made in the pleadings. The claim of lack of knowl-

edge first appears in the briefs of opposing counsel in the Court of Appeals. It would seem that if lack of knowledge on the part of the majority shareholders is an element in the case, the burden would be on those shareholders to have alleged in an answer that they had no such knowledge. The answer filed by the corporation makes no such allegation and even the intervening petition which was filed by the majority shareholders and which was later dismissed contained no charge of lack of knowledge. (Transcript, page 6.)

We quote from page 433 of the majority opinion the Supreme Court:

> "But assuming, for the purposes of this discussion, that the majority stockholders did have notice or were chargeable with notice of the minority demands, could they have acted in the assertion of their individual rights and, if so, were they obliged to act? It seems to us that the question requires a negative answer. In the first place, the controlling statute does not provide for action on the part of the majority; negotiations and resort to judicial proceedings are limited to the corporation and the minority stockholders who have asserted themselves." (Transcript, page 109.)

The court cited no authorities in support of this astounding proposition. No authorities could be cited.

We will not at this time discuss the text writers or the adjudicated cases in Ohio which clearly settle the proposition that stockholders do have the right to act in the name of the corporation in the event of the failure of the corporation to act in their behalf but we will merely cite a few of the Ohio authorities which so hold. We do not attempt to cite the hundreds of cases decided by other jurisdictions which declare a similar doctrine and it is

unnecessary to say that not a single jurisdiction has ever held the contrary.

Dodge v. Woolsey, 18 Howard, 331, 15 L. Ed., 401;
Zinn v. Baxter, 65 O. S., 341;
Wasmer v. Massillon Iron Works, 7 O. App., 488; motion to certify overruled;
Truman v. Machinery Co., 11 O. App., 220;
Koblitz v. Brookside Co., 20 C. C. (N. S.), 67;
Baldwin v. Hillsboro Co., 10 W. L. J., 337;
Geiger v. American Seeding Machine Co., 124 O. S., 222;
Henry v. Jeanes, 47 O. S., 116, 48 O. S., 443.

A leading case on this principle and one of the earliest is Dodge v. Woolsey, 18 Howard, 331, which was appealed to the U. S. Supreme Court from the Ohio Circuit Court wherein it was held that stockholders might enjoin the directors from doing acts in violation of the charter.

See also Fletcher Cyc., Corp. Perm. Ed., Section 5939 et seq.; 10 Oh. Jur., Section 244 et seq.

NOTICE OF DEMANDS TO CORPORATION IS NOTICE TO THE MAJORITY SHAREHOLDERS.

This was virtually so declared by Judge Reynolds in dismissing the majority shareholders from the case.

It was again substantially so stated by Judge Geiger in his opinion.

It was definitely so declared by the Court of Appeals of Erie county in the case of **Commercial Banking and Trust Company v. Tenants Realty Company**, 37 O. App., 566. We quote the following headnotes

"(2) Directors of corporation occupy fiduciary relations toward stockholders.

"(3) Directors of corporations as trustees of stockholders must act in interest of stockholders and protect their rights in good faith."

We do not concede, in view of the elementary law governing corporations and the management thereof, that the majority shareholders were entitled to any notice other than a notice of the meeting called for considering the proposed action. Nor do we concede that it is incumbent upon the plaintiff to prove that the majority shareholders did receive any such specific notice, even if they were entitled to it.

Moreover, if the majority shareholders were entitled to such specific notice of the demands, surely it would be incumbent upon them to set up the want of such notice, as a defense, which has not been done in this case.

But let us examine at this time the facts and the law. That all shareholders are charged with knowledge of the law need not be repeated here. Nor need we repeat that under no section of the Corporation Act could the corporation make a sale of substantially all of its property and assets except under Sections 8623-65 and 8623-72. As said in **Geiger v. Seeding Mch. Co.**, 124 O. S., at page 236,

> "the contract of sale is governed by Sections 8623-65 and 8623-72."

In fact by the express terms of 8623-65 it is admonished that no such sale can be made except

> "When and as authorized by the vote of holders of shares entitling them to exercise at least 2/3 of the voting power on such proposal * * *. Notice of such meeting shall be given to all of the shareholders of record of the corporation whether or not they shall be entitled to vote thereat."

Now it is alleged by the petition and admitted by the answer that following the resolution of the board of directors such a meeting of the shareholders was called for and held on June 2, 1936 (and it is asserted in appellants'

brief, page 5, "The shareholders were notified of this proposal and a special meeting was held on June 2, 1936"), and at that meeting there were present either in person or by proxy 4,785 shares out of a total of 5,078.

General Code 8623-65 provides in part that

> "Dissenting shareholders * * * **shall be** entitled to **relief in the manner and under the conditions** hereinafter provided."

When the meeting was held on June 2, 1936, every shareholder was charged with knowledge of the foregoing provision of the Ohio Law under which the corporation proposed to make the sale.

The only section covering the rights of dissenting shareholders, outside of Section 65 itself, which so expressly provides that they **shall be** entitled to relief, is Section 8623-72 which sets forth in detail how they shall be protected. A preliminary step to secure such relief to which they **shall be entitled** is that the dissenting shareholders "who shall not have voted in favor of the proposals" shall within 20 days after the meeting "object in writing to the action so taken and shall demand in writing the payment of the fair cash value of his shares."

We point out that when dissenting shareholders appear at a duly called special meeting **of which every shareholder had due notice,** and vote against the proposal, that is sufficient notice to the majority shareholders that the dissenting shareholders are proceeding to obtain the "relief in the manner and under the conditions" set forth in that statute. We do not conceive how by any stretch of the imagination it could be held that the majority shareholders are entitled to separate individual notices of the demands. We have dwelt upon this question because appellants have emphasized the claim that "the majority

shareholders had no notice of the demands of the dissenters."

Perhaps we should have disposed of this question of knowledge of "majority shareholders" by pointing out that, having had due notice of the proceedings instituted by the corporation, they are charged with knowledge, that they constituted the corporation, that they controlled it, that they voted for the sale, and otherwise participated in the procedure, that they are bound by all the consequences of their acts, and by the corporate acts. As said in **New Jersey & H. R. R. Co. v. American Elec. Works**, 82 N. J. L., 91, 81 Atl., 989:

> "The majority in interest in availing themselves of the privilege conferred by the act * * * agree in advance to make compensation to the dissenters."

Leavenworth Co. v. Chicago, R. I. & P. Ry. Co., 18 Fed., 209, was a case growing out of the consolidation of two railroads and involved a suit by a stockholder to set aside a sale by one company to the other upon the ground that the stockholder had no notice. This case was decided by a United States Circuit Court before the organization of the Court of Appeals. It was decided by two judges. The justly famous John F. Dillon was of counsel in that case which is assurance that the research in that case was thorough and that the propositions of law were exhaustively presented.

We quote from page 211 of the opini n:

> "On the contrary, the court would be inclined to hold that the stockholders of the respective corporations are charged with notice of the proceedings, and bound to proceed with reasonable diligence to annul them."

And again at the same page:

> "It is said, however, that the complainant may have had notice of the fact of consolidation, but not of the facts rendering the consolidation fraudulent. No doubt the question in all such cases must be, not whether complainant had knowledge of the act complained of, but whether he knew, or might, by proper diligence, have known, of the facts constituting the fraud."

And again at page 212:

> "• • • Can the defendant be heard to plead its ignorance of the powers of the corporation of which it was a member? We think it was bound to know what those powers were; and if it were not, it would be held bound, in such a case as this, to make inquiry within a reasonable time after the act complained of, and would be held to such knowledge as it might acquire by such inquiry."

To the same effect, but stated in in a different form, is the holding of the court in the case of Beechwood Securities Corporation, Inc., v. Associated Oil Co., et al., 104 Fed. (2d), 537. The fifth paragraph of the syllabus of that case is as follows:

> "No fraud warranting setting aside of a consolidation of corporations is committed on shareholder in corporation when he receives treatment which the statute advised him was his due when he invested in shares in the corporation."

The effect of the language of the above decision is that notice to the corporation is notice to the shareholder, and that the shareholder is entitled to no further notice. In other words, when the shareholder invests in the stock of the corporation, he submits himself to the management of the corporation and becomes bound by the acts of the officers of the corporation, so long as the officers act within

their powers. Or stated in another way, the statute advised him of his due, and his rights cannot rise higher than the rights of the corporation itself.

We conclude our argument upon this point by quoting from the majority opinion in the Court of Appeals:

> "The consenting stockholders further assert that they were not parties to the procedure and have no means of knowing what would be the outcome if the dissenting stockholder secured as a fair cash value the amount of his claim. They certainly were stockholders. **They had participated in the procedure** and they should have kept themselves advised as to what might be the effect of the action or failure to act of the corporation upon the amount ultimately to be distributed to them."

The action taken by the majority shareholders on June 2, 1936, authorizing the corporation to sell substantially all its property, was the very fountain head of plaintiff's right of action—**and of that meeting and of the action then taken the majority shareholders did have notice.**

ESTOPPEL BY ACCEPTING BENEFITS.

It is a well settled principle of law that a party who invokes the provisions of a statute for his own purposes and obtains relief under that statute to the disadvantage of another party will not thereafter be heard to complain of the validity of the statute which he has invoked or, as the court puts it, he will not be able to assail and rely upon a statute in the same proceeding. The following U. S. Supreme Court cases establish this principle:

Pierce Oil Co. v. Phoenix Refining Co., 259 U. S., 125, 66 L. Ed., 855;

Hirsch v. Block, 267 Fed., 614 (Writ of certiorari denied, 254 U. S., 240);

Grand Rapids, Etc., R. R. Co. v. Osborn, 193 U. S., 17, 48 L. Ed., 598.

All of the foregoing cases on the subject of estoppel by accepting benefits are cases decided by the Supreme Court of the United States. That court is, of course, the fountain head and final authority of principles governing due process as guaranteed by the Fourteenth Federal Amendment and yet the courts throughout the Union have been in perfect harmony with the Supreme Court cases on this subject..

It is unnecessary to discuss the above or the decisions of other states and we will content ourselves with citing a single case decided by the Supreme Court of Ohio:

New York Central R. R. Co. v. Bucyrus, 126 O. S., 558, 186 N. E., 450. This case involved an Ohio statute which was limited in its application to villages having a population of 3066. In the fourth syllabus, the court declared the statute to be unconstitutional because it was a statute of a general nature which would not have uniform operation throughout the state. The statute was further held invalid because it authorized the village to make donations to private corporations. Having declared the statute to be unconstitutional, the Supreme Court of Ohio nevertheless declared that a party claiming constitutional invalidity while having received, and still holding, the fruits of an agreement made under the statute is estopped from questioning the constitutionality of the law or the proceedings of the village.

Applying that decision to the instant case, the corporation and the majority stockholders having invoked the provisions of Section 65, which section refers to and makes 72 a part thereof, will not be permitted to claim the unconstitutionality of any part of Section 72.

IS THIS A CONTROVERSY BETWEEN STOCKHOLDERS?

Judge Reynolds in the Common Pleas Court by his decision dismissing the intervening petitioners, in effect, held that the majority stockholders were bound by the corporate actions of the directors and officers. (Page 12 of this petition.)

Judge Leach of the Common Pleas Court, on final hearing, took a different view and declared that while the statute was valid as against the corporation, it was unconstitutional as against the majority stockholders.

The majority opinion of the Court of Appeals in reversing Judge Leach first epitomized his decision in the following language:

> "The majority of the stockholders had no statutory right to act personally by way of filing a petition to have determined the cash value of the plaintiff's shares; they were at the mercy of the directors whose actions they could not control or direct."

Commenting upon this declaration, the Court of Appeals answered it as follows:

> "We have already pointed out that there is ample machinery to protect all the stockholders. However, the complaint is made that the machinery testing the fair cash value asserted by the dissenting stockholders may not be put in operation by any other than the corporation through its officers, or the dissenting stockholders, and therefore if the corporation fails to make a counter offer and permits a period to elapse, that the property of the assenting stockholder is appropriated without due process of law. Aside from the fact that the board of directors represent stockholders, and conceding that such board of directors have ulterior motives and that with intent to favor the dissenting

stockholders has failed to have the corporation avail itself of the machinery to contest the dissenting stockholder's valuation of his stock, yet we are of the opinion that if the consenting stockholder has any reason to believe that the corporation will not protect his interests he may, within the six months' limit, intervene on his own behalf. In the instant case it will be observed that one stockholder, to wit, Bertha K. Krauss, did file an intervening petition which on motion was stricken from the files. However, it will be further observed that she filed this intervening petition on April 10, 1937, and that the six months' period had expired on December 2, 1936, and the fair cash value had then become fixed as the amount demanded by the dissenting stockholder. The consenting stockholders further assert that they were not parties to the procedure and have no means of knowing what would be the outcome if the dissenting stockholder secured as a fair cash value the amount of his claim. They certainly were stockholders. **They had participated in the procedure, and they should have kept themselves advised** as to what might be the effect of the action or failure to act of the corporation upon the amount ultimately to be distributed to them." (Boldface ours.)

The opinion of the Ohio Supreme Court on this point at page 433 of the report of that case states:

"By voting for the sale of the corporate property, the majority stockholders were not thereby chargeable with notice of the demands of the minority, affecting the individual interests of the former in the distribution of funds, which demands were subsequently transmitted to the coproration. The voting and the later conduct of the minority were separate and distinct matters. Geiger v. American Seeding Machine Co., 124 Ohio St., 222, 177 N. E., 594, 79 A. L. R., 614." (Transcript, page 109.)

It should be observed that Judge Geiger who wrote the majority opinion in the Court of Appeals in the instant case was the plaintiff in the case cited and it is significant that Judge Geiger also discussed that case in the course

of his opinion in the instant case taking an entirely different view of that authority.

We again quote from the Supreme Court opinion:

> "Putting it a little differently, 'a stockholder and the corporation of which he is a member, are separate and distinct persons in law, and their interests are always distinct and sometimes adverse.' Lawson & Covode v. Farmer's Bank of Salem, 1 Ohio St., 206, 211." (Transcript, page 108.)

Again, an Ohio case was cited. It should be observed however that Lawson v. Farmer's Bank, 1 O. S., 206, only decided that the interest of a stockholder of a corporation under the Ohio Code of evidence would not disqualify the witness but that it only affected the weight of his evidence. As an authority in the instant case as affecting the relation of the stockholder to the corporation, it is without any value whatever.

The effect of the above quotation is to deny that directors of an Ohio corporation are the representatives of the stockholders in corporate affairs which pronouncement flies in the face of the Ohio statutes on that subject. We therefore quote Section 8623-55:

> "All the capacity of a corporation shall be vested in and all its authority, except as otherwise provided in this act or in the articles in regard to action required to be taken, authorized or approved by shareholders, shall be exercised by a board of directors, of not less than three persons, which shall manage and conduct the business of the corporation." (112 Ohio Laws, page 35, Section 55.)

Even if the pronouncement of the Supreme Court of Ohio is a correct general statement of the relation between officers and stockholders, surely it cannot be a correct statement as applied to Section 8623-65 and Section 8623-72. The corporation having invoked the statute and the ma-

jority stockholders having prevailed and having imposed their will upon the dissenting shareholders, and the conditions imposed upon the minority shareholders having been complied with, the majority stockholders should not be heard to complain that the corporation ceases to be their representative after the vote is taken.

Judge Hart, who wrote a dissenting opinion, briefly stated that inasmuch as the defendants had "invoked the powers created by Section 8623-65, General Code, to bring about a sale of corporate property" they are estopped to question the constitutionality of Section 8623-72. (Transcript, page 113.) The logic of his brief dissenting opinion should have led him to declare that inasmuch as the statute is reciprocal that both the majority and the minority are estopped to question the constitutionality and that therefore the statute is "constitutional in operation."

We think the dissenting opinion of Judge Myers, who declared the statute to be constitutional on all points, has summed up this feature of the case with logic that is unanswerable.

> "When the majority stockholders voted upon the question of the sale of the property of the corporation they were charged with notice of the provisions of the statute. They set in operation the statute here involved. In doing so, they take the statute not only with its benefits but also with its infirmities, if any there be. It is not unlike the first step of a contract. Especially so since under Section 8623-72, General Code, a dissenting stockholder may not, without consent of the corporation, withdraw his demand for payment 'of such fair cash value,' once it is made. If in the light of later events he has demanded too little, he is bound by the procedure even as is the majority. In the instant case a procedure was outlined by the board of directors which the majority stockholders could authorize or not as they saw fit. If the majority stockholders are of the opinion that the procedure is in-

equitable they have only themselves to blame if they set the machinery in motion. One may not voluntarily initiate a procedure outlined in a statute and thereafter ask to be relieved from the effects of its operation on the claim of the statute's invalidity. Here the dissenting stockholders were not responsible for the situation in which the majority found themselves. Furthermore, the property having been sold, the majority are not in a position to place the dissenting stockholders in statu quo." (Transcript, page 114.)

DUE PROCESS.

The trial court and the Supreme in Ohio have declared the statute to be a violation of due process, "because of its effect in operation."

Keeping in mind that the statutory provision is reciprocal, and that the presumption only prevails against that party who fails to comply with its conditions, and that either party has equal and ample opportunity to comply, the "effect in operation" is fallacious reasoning.

The dissenting shareholders have been compelled to yield to the majority, and Section 8623-72 is their guaranty of due process. They have faithfully complied with the conditions of a statute designedly adverse to their interests. Surely, it is not a denial of due process to an arrogant majority, when the officers of the corporation who are their accredited representatives defiantly refuse to make a counter offer.

The seventh paragraph of Section 8623-72 uses the words "conclusively presumed" but we think that language does not mean that the real value of the property is fixed by the failure to make an offer or to bring the suit. The real meaning is that by reason of failure to comply with the conditions precedent, the corporation will not thereafter be heard to bring the value into question. In other

words, it is in the nature of a condition to the exercise of a right, or more accurately speaking, a condition precedent.

The Ohio statute comes clearly within the principles declared in Orient Insurance Co. v. Daggs, 172 U. S., 557, 43 L. Ed., 552. In that case, a statute of Missouri was under attack. The statute provided that in suits brought upon policies of fire insurance, the insurance company will not be permitted to deny that the property insured was worth less than the amount of insurance covered by the policy. The language of the statute in that case is "the defendant shall not be permitted to deny, etc." The real meaning of the seventh paragraph of Section 8623-72 is that unless the corporation offers an amount within the ten-day period or, failing in that, brings a suit within the six months period to determine fair cash value, that the company

> "Shall not be permitted to deny that the stock was worth the amount demanded by the minority stockholders."

Further referring to the Missouri statute, we find the following provisions:

> "And in the case of total loss of the property insured, the measure of damages shall be the amount for which the same was insured."

Paraphrasing that language into Section 8623-72, the Legislature might have said:

> "In case of failure to offer an amount or to invoke judicial process to determine fair cash value, the measure of damages shall be the amount demanded by the minority stockholders."

The foregoing case is cited as the leading case because it contains the declaration of the Supreme Court of the

United States. It should be stated, however, that Ohio has a similar statute, 9583, General Code, which states:

> "In the absence of any change increasing the risk without the consent of the insurers and also of intentional fraud on the part of the insured, in case of total loss, the whole amount mentioned in the policy or renewal upon which the insurer received a premium shall be paid."

Although this statute has been in effect since 1879, no one has ever questioned the validity of that provision.

The Supreme Court of Ohio has declared that the full amount of the policy can be recovered and not in a single case has the constitutionality of the statute been questioned.

Insurance Co. v. Leslie, 37 O. S., 409.

The foregoing cases present a pertinent analogy to the instant case. Insurance companies are held to a fulfillment of a contract. The analogy is that the relation between stockholders of a corporation and the corporation itself is contractual. Every stockholder is "conclusively deemed" to know the law and when he makes his stock subscription, he agrees to be bound by Section 8623-55, General Code, which confers upon the directors all corporate powers.

Furthermore, the majority stockholders meet and authorize the sale of the entire assets at a price wholly unsatisfactory to the minority shareholders, they acquire the advantage given by Section 8623-65 imposing their will upon the minority and by the same token become bound by the last paragraph of that section which entitles dissenting shareholders to the relief provided in Section 8623-72. This obligation upon the dissenting shareholders to submit to the will of the majority and also the obliga-

tion of the majority to give relief to the minority is contractual, the statutes being read into the relations between them and also being read into the proceedings. The majority opinion of the Supreme Court of Ohio is entirely silent upon this point and the dissenting opinion of Judge Myers takes full cognizance thereof.

Returning to the question of due process and again concurring with opposing counsel that due process only requires that parties shall have a fair opportunity to resort to judicial process, let us further consider the practical application of those principles.

The guaranty of due process certainly does not mean that any party may deliberately ignore all statutory provisions for his protection and knowingly, stubbornly and defiantly proceed in disregard of all safeguards provided for his protection and then when he finds himself at a disadvantage or inconvenience, claim the protection of the guaranty of due process.

The trial court in its opinion in declaring that the seventh paragraph of Section 8623-72 violates due process, cited only the case of **Manley v. Georgia**, 279 U. S., 3. That case involved a criminal statute which was particularly drastic because the presumptions therein created against the officers of a bank which had failed in business was such as to not only put upon the officers the burden of proving their innocence but it even made it practically impossible for them to prove their innocence by reason of the sweeping character of the presumptions. Even so, Mr. Justice Butler stated in the opinion at page 6 that it was only necessary that a defendant have "a fair opportunity" to repel the presumption.

While the seventh paragraph under discussion does use the word "conclusively," that term only becomes applicable

when the corporation defiantly disregards the provisions which are made in the fifth and sixth paragraphs which afford the corporation and the majority stockholders full safeguards.

The Court of Appeals in its opinion declares the case of Manley v. Georgia not to be sufficiently pertinent to be commented upon and makes the same statement of many other cases which were cited in the brief of opposing counsel in that court.

In this connection, we desire to cite other cases of the Supreme Court of the United States which have held that a statute which in terms creates a conclusive presumption is constitutional if there has been "a fair opportunity" to repel it.

Western and Atlantic Railway v. Henderson, 279 U. S., 639, 73 L. Ed., 884;
Schlesinger v. Wisconsin, 270 U. S., 230, 70 L. Ed., 557;
Heiner v. Donnan, 285 U. S., 321, 76 L. Ed., 772.

It is significant that although these cases were considered by the lower courts, the Supreme Court of Ohio made no comment upon any of them and indulged in no discussion whatever as to whether or not Section 8623-72 affords a fair opportunity to repel the presumption. The Court of Appeals held that there was a fair opportunity. Judge Reynolds of the Common Pleas Court held that there was an ample opportunity and Judge Leach declared "the corporation as such had a fair opportunity."

CONCLUSION.

Summarizing the foregoing pages, it is our contention that:

(1) All the elements giving this court jurisdiction to grant a writ of certiorari are present in this case.

(2) There is involved the question of the constitutionality of an Ohio statute as measured by the Fourteenth Federal Amendment.

(3) It has been declared by the Ohio courts that that statute shall be liberally construed in favor of minority shareholders.

(4) The seventh paragraph of Section 8623-72 is mutual in its operation.

(5) There were several ways, even after the minority shareholders had made their demands, whereby the corporation or the majority shareholders could have availed themselves of legal remedies, thereby avoiding the conclusive presumption:

(a) The corporation could have offered "an amount" within ten days under the fourth paragraph of 8623-72.

(b) The corporation could have brought a suit within six months under the sixth paragraph of 8623-72.

(c) The majority shareholders or any one of them could have done likewise in the name of the corporation upon demand of and refusal by the corporation under the sixth paragraph of 8623-72.

(d) The corporation for any reason could have abandoned its purpose to sell under the third paragraph of 8623-72.

(e) The majority shareholders could have revoked the authority to sell under the third paragraph of 8623-72.

(6) Having invoked the favorable provisions of Section 8623-65 and other statutes for its own advantage and the advantage of the majority shareholders, both the corporation and the majority shareholders are estopped to claim unconstitutionality of a segregated paragraph.

(7) Judge Reynolds in a decision dismissing an intervening petition of a shareholder, held:

(a) The statute is constitutional for the reason that "the opportunity for the company to protect itself is amply provided for," and:

(b) The remedy of the majority stockholders is against the directors "who were derelict in their duty."

(8) The failure of the majority shareholders to appeal after final judgment against them when dismissed from this cause by Judge Reynolds constitutes **res judicata.**

(9) The rights of the majority shareholders as such rise no higher than the rights of the corporation.

(10) Notice by dissenting shareholders to the corporation is notice to the majority shareholders as to all matters pertaining to or growing out of the action of the shareholders at the meeting of June 2, 1936.

The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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